Comments

Human Rights in an International Context: Recognizing the Right of Intimate Association

INTRODUCTION

The right of privacy has been recognized by the United States Supreme Court as a fundamental right under both due process and equal protection analyses.[1] From an examination of the cases defining the right of privacy, it is clear that the limits of this right have yet to be delineated.[2] Perhaps one of the most volatile areas in which the right of privacy has been implicated is that of sexual intimacy. The right has been invoked to protect the choice of married persons to engage in certain acts of sexual intimacy,[3] unmarried individuals to engage in a non-procreative sexual relationship,[4] and homosexual persons to engage in intimate sexual behavior.[5]

Because this relatively new constitutional right[6] implicates one of the most fundamental aspects of human existence,[7] it is imperative that the limits of its protection be carefully considered and delicately drawn. This Comment will examine the right of privacy as it affects sexual intimacy between two individuals without regard to their marital status or their gender. The right of privacy as it has developed in the United States will be examined briefly. The right to respect for one's private life will then be examined under the European Convention on Human Rights,[8] and the relation of privacy to the right of intimate association described. Finally, this Comment will consider the rational limits of the right of privacy in the United States within the international context of respect for the individual's private life.

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1. The right of privacy was first identified as a fundamental right in Griswold v. Connecticut, 381 U.S. 479 (1965). It was cited as a fundamental right in *Griswold* and in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Whalen v. Roe, 429 U.S. 589 (1977); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976); and Roe v. Wade, 410 U.S. 113 (1973). The *Griswold* Court cited Skinner v. Oklahoma, 316 U.S. 535 (1942), decided on equal protection grounds as a "right of privacy" case. 381 U.S. 479, 485 (1965).

2. Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977).

3. Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976).

4. Eisenstadt v. Baird, 405 U.S. 438 (1972); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S. Ct. 2323 (1981).

5. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901, *rehearing denied*, 425 U.S. 985 (1976) (unsuccessfully); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (successfully), *cert. denied*, 101 S. Ct. 2323 (1981).

6. The right of privacy was first identified as a fundamental right in Griswold v. Connecticut, 381 U.S. 479 (1965). In contrast, the Bill of Rights was adopted in 1791, and the 14th amendment was added in 1868.

7. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 941–48 (1978); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Richards, *Unnatural Acts and the Constitutional Right to Privacy*, 45 FORDHAM L. REV. 1281 (1977); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979).

8. *See* notes 121–68 and accompanying text *infra*.

I. THE RIGHT OF PRIVACY IN THE UNITED STATES

The right of privacy in the United States is not a static doctrine. From its inception it has encompassed the most important of personal freedoms[9] and has evolved to the point where, today, it implicitly protects the right of all individuals to associate with whomever they please in an intimate relationship.

The right of privacy was first articulated by the United States Supreme Court in *Griswold v. Connecticut*.[10] In *Griswold*, the Court held unconstitutional a Connecticut statute forbidding the use of contraceptives by married couples.[11] Considerable emphasis was placed upon the sanctity of marriage and the protection from outside interference afforded two individuals committed to that relationship. The idea that the state could invade "the sacred precincts of marital bedrooms"[12] was held to be offensive to the right of privacy found in the penumbra of the Bill of Rights.

The Supreme Court again addressed the privacy issue in *Eisenstadt v. Baird*,[13] a case in which another statute forbidding the distribution of contraceptives—this time to unmarried persons—was declared unconstitutional. In this opinion Justice Brennan articulated what is probably the most concise definition of the right of privacy in American constitutional law: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[14] Thus defined, the right of privacy becomes a right to avoid something, a right "to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person."

The right of privacy is not limited to conduct engaged in by persons in the

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9. As Justice Brandeis noted:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

10. 381 U.S. 479 (1965). The right was recognized implicitly, however, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

11. 381 U.S. 479, 485 (1965).

12. *Id.*

13. 405 U.S. 438 (1972).

14. *Id.* at 453 (emphasis in original). The *Eisenstadt* definition of the right of privacy is heavily relied upon by jurists and commentators. *See, e.g.*, People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S. Ct. 2323 (1981); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1204 (E.D. Va. 1975), (Merhige, J., dissenting), *aff'd mem.*, 425 U.S. 901 (1976); Lasson, *Homosexual Rights: The Law in Flux and Conflict*, 9 BALT. L. REV. 47, 54 (1979); Note, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 533, 575 (1976); Comment, Doe v. Commonwealth's Attorney: *A Set-Back for the Right of Privacy*, 65 KY. L.J. 748, 756 (1977); Recent Decision Note, Doe v. Commonwealth's Attorney, 15 DUQUESNE L. REV. 123, 125 (1976).

privacy of their own homes.[15] In *Roe v. Wade*[16] the Supreme Court expanded the right of privacy to include the right of a woman to terminate a pregnancy. The Court held that the decision to terminate a pregnancy is to be made by the woman in consultation with her physician and not by the State.[17] The *Roe* decision, however, did not articulate an absolute right of privacy devoid of governmental intrusion. Only "unwarranted governmental intrusion" was held to be forbidden by the constitutional right of privacy under *Roe*.[18] The Supreme Court determined that each state remains authorized to promulgate reasonable regulations for the safety and health of the woman during the second trimester of pregnancy and may, in the interest of protecting potential life, forbid abortion during the third trimester of pregnancy, except where the abortion is necessary to preserve the woman's life or health.[19]

Thus, in *Roe*, the Court makes it clear that governmental intrusion into an individual's lifestyle is permissible only when the state shows that such intrusion is "warranted."[20] However, it is also clear from the decision that the state must show that the governmental intrusion is necessary to achieve compelling state objectives.[21]

The right of privacy, most recently expanded within the context of procreational choice,[22] is an expression of commitment to individual autonomy and freedom from governmental intrusion into private choices.[23] The Supreme Court enunciated the constitutional commitment to individual autonomy in *Meyer v. Nebraska*[24] as follows:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitively stated. Without doubt, it denotes not merely freedom

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15. For a more expansive view of privacy, see Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428–36 (1980) (characteristics of privacy include information known about an individual, attention paid to an individual, and physical access to an individual). *See also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (cause of action for invasion of "right of publicity" recognized); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) (cause of action for "false light" invasion of privacy recognized); Time, Inc. v. Hill, 385 U.S. 374 (1967) (constitutional limits on cause of action for invasion of privacy); RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (defining causes of action for invasion of privacy).

16. 410 U.S. 113 (1973).

17. *Id.* at 153.

18. *Id.* at 154–55.

19. *Id.* at 164–65.

20. This burden has proven difficult to overcome; many state statutes purporting to regulate abortions have been declared unconstitutional. *See, e.g.*, Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Wolfe v. Schroerling, 541 F.2d 523 (6th Cir. 1976); Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975). Many, however, have not. *See, e.g.*, Poelker v. Doe, 434 U.S. 519 (1977); Connecticut v. Menillo, 423 U.S. 9 (1975).

21. The standard to be applied in cases in which a violation of a fundamental right is alleged is "strict scrutiny." *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Skinner v. Oklahoma, 316 U.S. 535 (1942).

22. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965) (involving the right of a woman to use contraceptives or to terminate a pregnancy).

23. *E.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

24. 262 U.S. 390 (1923).

> from bodily restraint but also the right . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[25]

In *Stanley v. Georgia*[26] the Court defined the limits of permissible intrusion by the state by holding that the State may not impose itself in an individual's home to enforce its otherwise valid obscenity statute. Under the reasoning of *Stanley*, the state may not intrude into an individual's home even to enforce a statute that it may enforce within a public sphere. It may, therefore, be argued that governmental intrusion into a truly private sphere, such as an individual's home, must meet a much higher standard of constitutional review than would governmental regulation of clearly public conduct.

Stanley v. Georgia was a decision based upon the freedom from intrusion guaranteed by the fourth amendment, while *Roe v. Wade* was a decision based upon the right of autonomous action found in the penumbra of the Bill of Rights and the fourteenth amendment.[27] In the context of intimate relationships, this distinction becomes blurred. Such relationships are pursued primarily in a strictly private context; hence, the doctrine of freedom from intrusion applies.[28] However, the right of "locational" privacy found in *Stanley v. Georgia* and *Griswold v. Connecticut* has been expanded to encompass the right to personal autonomy in life choices, regardless of the forums in which those choices are pursued.[29] Thus, the autonomy guaranteed by the right of privacy extends into the public sphere, and individuals are guaranteed the right to the orderly pursuit of happiness.[30] The choice to pursue an intimate relationship is protected within the home and arguably in a more public sphere.

Once the concept is accepted that the pursuit of happiness by individuals should be protected by the Constitution, and particularly by the right of privacy, it follows that the pursuit of intimate relationships, so central to the happiness of human beings,[31] is protected. Under the doctrine expressed in

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25. *Id.* at 399. *See also* notes 38–40 and accompanying text *infra* (discussing the common law action of invasion of privacy and the accompanying right to be free from invasion by other individuals).

26. 394 U.S. 557 (1969).

27. *See* notes 15–21 and accompanying text *supra*.

28. Stanley v. Georgia, 394 U.S. 557 (1969). *See also* Whalen v. Roe, 429 U.S. 589, 599 n.24 (1977); note 26 and accompanying text *supra*.

29. Roe v. Wade, 410 U.S. 113 (1973) (the right to terminate a pregnancy is exercised, of necessity, in a hospital or clinic, not in a private home or bedroom); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S.Ct. 2323 (1981) (the right of autonomous choice in sexual matters may be exercised in a car parked on a public street and the court will not inquire into the privacy of the forum).

30. Olmstead v. United States, 277 U.S. 438.(1928); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert denied*, 101 S.Ct. 2323 (1981). (The New York Court of Appeals refused to reach the issue of whether sexual conduct in a parked car was within a "private sphere," holding instead that the autonomy guaranteed by the right of privacy encompassed such conduct).

31. A noted psychologist has stated:

> The needs for safety, belongingness, love relations and for respect can be satisfied only by other people, i.e., only from outside the person. This means considerable dependence on the environment. A person in this dependent position cannot really be said to be governing himself, or in control of his own fate. He *must* be beholden to the sources of supply of needed gratifications. Their wishes, their whims, their rules and laws govern him and must be appeased lest he jeopardize his sources of supply.

A. MASLOW, TOWARD A PSYCHOLOGY OF BEING 25, 34 (1968).

Stanley, the pursuit of intimate relationships within one's own home is protected from governmental intrusion.[32] The right of autonomous choice expressed in *Roe v. Wade* protects the "public component" of intimate relationships as long as a compelling governmental justification does not limit the exercise of choice in the orderly pursuit of happiness.

The notion of protecting an individual's privacy is not new. In *Whalen v. Roe*[33] the Supreme Court summarized the interests protected by the right of privacy: the right of individuals to be free from governmental intrusion into their private affairs;[34] protection from involuntary exposure of private affairs;[35] and freedom from governmental compulsion in one's action, thought, experience, and belief.[36] While the rights to be free from governmental intervention and compulsion are protected by constitutional provisions,[37] freedom from invasion of privacy by individuals has been protected by the law of torts[38] and its remedies.[39] The private sphere is no less sacrosanct when invaded by the state and must be equally well protected. It would be anomalous for the common law to refuse to tolerate an intrusion by one individual upon the seclusion of another but for the Constitution to tolerate an intrusion by the state upon the seclusion of an individual.[40]

Underlying the decisions from *Meyer v. Nebraska* to *Roe v. Wade*, and beyond, is the principle that autonomous choice has constitutional value. The Constitution of the United States is the embodiment of the rights of a free people to the orderly pursuit of happiness, and this same Constitution places limits on the states' power to regulate autonomous choice. Only with compelling justification can the state proscribe the exercise of autonomous choice by individuals that is protected by the right of privacy.[41] The pursuit of intimate relationships, be they within the state-sanctioned institution of marriage, between unmarried persons of opposite gender, or between unmarried persons of the same gender, falls easily within the constitutional protection of autonomous choice in the orderly pursuit of happiness.

II. Challenging Governmental Intrusion into the Fundamental Choice of Intimate Association

Nowhere is the intrusion into the fundamental choice of intimate association so transparently illustrated as in the interference of various states with

32. *See* notes 26–28 and accompanying text *supra*. The pursuit of intimate relationships within one's home also is protected from intrusion by other individuals. *See* notes 38–40 and accompanying text *infra*.

33. 429 U.S. 589 (1977).

34. *Id.* at 599 n.24. *See* notes 10–32 and accompanying text *supra*.

35. 429 U.S. 589, 599 n.24 (1977). *See* notes 26–28 and accompanying text *supra*.

36. 429 U.S. 589, 599 n.24 (1977).

37. *See* notes 10–32 and accompanying text *supra*.

38. RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (1976).

39. RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1976).

40. An individual into whose home another has intruded has a remedy at common law. RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1976). However, in some states the State remains free to intrude upon an individual in his or her home to enforce its sodomy law. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

41. *See* note 21 and accompanying text *supra*.

individuals' right to form intimate relationships with partners of the same sex. At least one court has found such intrusion unconstitutional[42] but this case is the exception. Apparently overcome by the "immorality"[43] of homosexuality *per se*,[44] the United States District Court for the Eastern District of Virginia upheld the constitutionalaity of Virginia's consensual sodomy law in *Doe v. Commonwealth's Attorney*.[45] The court disposed of the right of privacy as if *Griswold v. Connecticut*[46] were the only authority for the constitutional limits of the right:

> With no authoritative judicial bar to the proscription of homosexuality—since it is obviously no portion of marriage, home or family life—the next question is whether there is any ground for barring Virginia from branding it as criminal. If a State determines that punishment therefor, even when committed in the home, is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so.[47]

This decision was affirmed by the Supreme Court without opinion.[48]

Courts and commentators have raised numerous justifications to uphold the constitutionality of sodomy statutes. Among these are that sodomy statutes are necessary to protect and maintain morality and decency,[49] that the Bible evidences a divine proscription of sodomy,[50] that acts of sodomy are

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42. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S.Ct. 2323 (1981). In 1979 twenty-nine states and the District of Columbia retained criminal penalties for deviant sexual conduct between consenting adults in private. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 949–51 (1979). The state of New Jersey repealed its consensual sodomy law in 1980. N.J. STAT. ANN. § 2C:98-2 (West 1980) (repealing N.J. STAT. ANN. §§ 2A:143–1, 143–2). The Court of Appeals of New York held that state's consensual sodomy law unconstitutional under the right of privacy. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S.Ct. 2323 (1981).

43. *See* notes 59–62 and accompanying text *infra*.

44. *See* notes 84–87 and accompanying text *infra*.

45. 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

46. 381 U.S. 479 (1965).

47. Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). Note that this passage clearly illustrates the district court's view of sodomy laws as a proscription of *homosexuality*, not a proscription of particular sexual conduct. The court makes no mention of the extensive history of the development of the right of privacy and its protection of the "orderly pursuit of happiness"; the court simply states that homosexual relationships do not fit within the sphere of "marriage, home or family life" presented in *Griswold* and are, therefore, excluded from protection. Finally, the court fails to mention Stanley v. Georgia, 394 U.S. 557 (1969), and instead makes the sweeping statement that the state may intrude into an individual's home to enforce the nebulous concepts of "morality and decency."

48. 425 U.S. 901, *rehearing denied*, 425 U.S. 985 (1976). *But see* notes 140–41 and accompanying text *infra*. The Supreme Court has not addressed this issue in any later case. Therefore, *Doe v. Commonwealth's Attorney* stands as the latest authority on the constitutionality of sodomy statutes. *But see* People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S.Ct. 2323 (1981) (distinguished *Doe* on the basis that the Supreme Court summarily affirmed because the plaintiffs lacked standing).

49. People v. Onofre, 51 N.Y.2d 476, 489, 415 N.E.2d 936, 941, 434 N.Y.S.2d 947, 951–52 (1980), *cert. denied*, 101 S.Ct. 2323 (1981); Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); Reply Brief on Behalf of Defendants at 22–25, Doe v. Commonwealth's Attorney, 403 F.Supp. 1199 (E.D. Va. 1975).

50. People v. Onofre, 51 N.Y.2d 476, 488 n.3, 415 N.E.2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980), *cert. denied*, 101 S.Ct. 2323 (1981); Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1202 n.2 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

unnatural and deviant,[51] that the failure to legally proscribe sodomy will result in the destruction of the institution of marriage,[52] that the failure to legally proscribe sodomy will place minors in danger of homosexual assault,[53] that the public despises homosexuality,[54] and that homosexuality might become an accepted lifestyle if the legal proscriptions against it were removed.[55]

These justifications have been answered by legal commentary and at least one judicial decision.[56] Morality and decency are concepts that defy precise definition. They are dependent upon human perceptions of "right and wrong" and are often rooted in theology. However, in the pursuit of public morality, the moral basis of the Constitution is too frequently overlooked. The right of each individual to be free in his or her private life is no less a manifestation of the moral order of society than is the protection of public decency. "In order to understand and interpret the constitutional design, we must take seriously the radical vision of human rights that the Constitution was intended to express and in terms of which the written text of the Constitution was intended to be interpreted."[57] The moral order of society is denigrated, not served, by the elevation of the beliefs of some individuals that homosexuality is immoral over the commitment to human rights and freedoms embodied in the Constitution. The refusal of some courts to permit the legislation of morality[58] at the expense of individual freedoms constitutes judicial recognition of the supremacy of the moral basis of the Constitution over the beliefs of individuals.

The notion that homosexuality is immoral is deeply rooted in the Judeo-Christian ethic.[59] Several passages from the Bible are cited frequently as authority for this notion.[60] These passages, however, are far from conclusive

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51. People v. Onofre, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940, 434 N.Y.S.2d 947, 951 (1980), *cert. denied*, 101 S.Ct. 2323 (1981); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1285–86 (1977).

52. People v. Onofre, 51 N.Y.2d 476, 490, 415 N.E.2d 936, 941, 434 N.Y.S.2d 947, 951–52 (1980) *cert. denied*, 101 S.Ct. 2323 (1981); Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting), *aff'd mem.*, 425 U.S. 901 (1976); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 994 (1979).

53. WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 56–57 (1963).

54. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 n.2 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); Reply Brief on Behalf of Defendants at 26, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975).

55. Reply Brief on Behalf of Defendants at 27, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975).

56. *See* notes 57–83 and accompanying text *infra*.

57. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 960 (1979).

58. *E.g.*, People v. Onofre, 51 N.Y.2d 476, 488 n.3, 415 N.E.2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980), *cert. denied*, 101 S.Ct. 2323 (1981).

59. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

60. *Id.* at 1202 n.2. *See* J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 92, 95 (1980); J. MCNEILL, THE CHURCH AND THE HOMOSEXUAL 37–39 (1976); L. SCANZONI & V. MOLLENKOTT, IS THE HOMOSEXUAL MY NEIGHBOR 54, 59–63 (1978).

on the issue of the morality of homosexuality, even from a Biblical viewpoint. Biblical scholars have argued that the oft-quoted passages regarding homosexuality are misinterpreted[61] and that it is possible that the passages are incorrectly translated.[62] Thus, even Biblical scholars are unable to agree on the morality of the homosexual lifestyle.

It has often been stated that homosexual conduct is deviant or "unnatural."[63] "Unnatural" is defined as "not being in accordance with nature or consistent with a normal course of events" and "not being in accordance with normal feelings or behavior."[64] Interestingly, Masters and Johnson have shown that the physiological response patterns of homosexual couples differ little from those of heterosexual couples.[65] Therefore, it cannot credibly be argued that homosexual conduct is not "consistent with a normal course of events."

A significant result of the studies carried out by Masters and Johnson relates directly to the issue of whether homosexual feelings are "in accordance with normal feelings or behavior." These investigators found:

> In handling sexual fantasy material, particularly that which runs counter to cultural mores, there must be constant awareness of the great difference between what men and women publicly profess as acceptable sexual conduct, what they report as fantasy content during most interviews, and what they fantasize privately and reveal only in unusual circumstances.
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> Cross-preference sexual interaction had been described as "unthinkable," "revolting," "inconceivable" during discussions with small groups of fully committed heterosexual or homosexual men and women. Yet the very men and women whose public condemnation of variant sexual activity was most vitriolic evidenced a significant curiosity, a sense of sexual anticipation, or even fears for effectiveness of sexual performance when musing in private interviews on the subject of cross-preference sexual interaction.[66]

Thus, one should not rely on the public protestations of individuals for the delineation of what constitutes "normal feelings or behavior." When confronted with such inconsistencies between what people publicly profess as acceptable and what they privately consider with interest, the need for the protection of a right of privacy becomes especially clear.[67]

The myth that sodomy is physically harmful has been dispelled by the research of Masters and Johnson.[68] No significant differences in the sexual

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61. J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 92–117 (1980); J. MCNEILL, THE CHURCH AND THE HOMOSEXUAL 37–50, 56–66 (1976).

62. *See* authorities cited in note 61 *supra*.

63. People v. Onofre, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940, 434 N.Y.S.2d 947, 951 (1980), *cert. denied*, 101 S.Ct. 2323 (1981); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1285–86 (1977).

64. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 972 (1971).

65. W. MASTERS & V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE 170–71, 124–43 (1979).

66. *Id.* at 186.

67. The same inconsistencies exist with respect to "deviant" behavior. "Deviant" is defined as "deviating esp. from some accepted norm." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 227 (1971).

68. W. MASTERS & V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE 83–86 (1979).

responses of heterosexual, homosexual, and ambisexual[69] men and women were reported. In addition, the physiology of anal intercourse was studied under laboratory conditions and no physical harm was reported.[70] That sodomy can transmit venereal diseases is no more significant than the fact that sexual contact of any sort can spread venereal diseases.[71] Thus, those who have argued that sodomy should be prohibited because it is physically harmful have been unable to carry their burden of proof.[72]

The argument that the legalization of homosexual conduct somehow will inhibit heterosexual marriage has been described as "unworthy of judicial response."[73] The contention that significant numbers of individuals would forego heterosexual marriage if they were permitted a choice between a heterosexual or homosexual lifestyle belies a fear that "homosexual preference is so strong and universal and heterosexual preference so weak (and conventional family life so unattractive) that people would, on a massive scale, tend not to undertake heterosexual marriage if homosexuality as a way of life were legitimate."[74] Such a fear is without basis in fact.[75]

Much discussion of the decriminalization of homosexual conduct centers on the fear that decriminalization will leave children in increased danger of homosexual assault.[76] The likelihood of such a result is no greater than the likelihood that children will be subject to heterosexual assault under current statutes.[77] Sexual assault of children can be directly proscribed by statute.[78] If a statute omits sex-specific language, any sexual assault upon a child will be proscribed, and the sex of the assailant would be irrelevant. Some states have drafted rape and other sexual assault statutes to include more varieties of sexual conduct than vaginal intercourse.[79] These statutes directly protect children from sexual assault, making additional, indirect methods, such as sodomy statutes, unnecessary.

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69. The term "ambisexual person" describes those "[s]ubjects describing a history of sexual experience in which male and female partners were involved in approximately equal numbers. . . . These men and women were given a Kinsey preference rating of 3." *Id.* at 144. For a discussion of Masters and Johnson's use of the Kinsey rating system, see *id.* at 7–10.

70. *Id.* at 83–86.

71. *See* Reply Brief on Behalf of Defendants at 28, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975).

72. *E.g.*, People v. Onofre, 51 N.Y.2d 476, 488–89, 415 N.E.2d 936, 941, 434 N.Y.S.2d 947, 951 (1980), *cert. denied*, 101 S.Ct. 2323 (1981).

73. Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting), *aff'd mem.*, 425 U.S. 901 (1976).

74. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 994 (1979).

75. Estimates of the percentage of homosexual persons among citizens of the United States vary widely, but nowhere is the percentage estimated at greater than 14%. *E.g.*, Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 800 n.4 (1979).

76. WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 46 (1963).

77. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 988 (1979).

78. *See, e.g.*, OHIO REV. CODE ANN. §§ 2907.02–.06 (Page 1975).

79. *See, e.g.*, OHIO REV. CODE ANN. § 2907.01 (Page 1975). *Cf.* MODEL PENAL CODE § 213.2 (deviant sexual intercourse by force or imposition).

The inherent flaw in the argument that sodomy should be criminally proscribed because the public despises homosexuality[80] is graphically illustrated by the inconsistency between this argument and the argument that homosexual conduct might become acceptable if it were not criminally proscribed.[81] A public that truly despises homosexuality will not cease to despise it if criminal sanctions against homosexuality are removed.[82] It is impossible to sort out whether homosexuality is illegal because it is despised or whether it is despised because it is illegal. Whatever the purported justification for despising homosexual persons, the imposition of criminal penalties based upon public sentiment abandons the commitment found in the Constitution to preserving the rights of minority populations.[83]

In addition to rebutting the above purported justifications for sodomy statutes, opponents of sodomy legislation have argued that it effectively criminalizes the "status" of being a homosexual person in violation of the eighth amendment to the Constitution.[84] Plaintiffs in *Doe v. Commonwealth's Attorney* argued that they had been the object of police abuse and that "[s]uch abuse has branded Doe with the stigma of criminality, directly emanating from the law's proscription of the one form of sexual gratification which he can enjoy."[85] The court's response to the argument that "no authoritative bar to the proscription of homosexuality" exists[86] lends credence to the argument that sodomy laws effectively criminalize the status of homosexuality. The Supreme Court has held that legislation criminalizing a "status" violates the eighth amendment.[87]

Homosexual conduct remains illegal in twenty-seven states and the

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80. *See* Reply Brief on Behalf of Defendants at 26, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, (E.D. Va. 1975).

81. *See id.* at 27.

82. *See* notes 66–67 and accompanying text *supra* (The public protestations of individuals do not necessarily comport with the private interests of the same individuals.).

83. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

84. Plaintiffs' Opening Brief at 2, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975). Statutes that define a status as criminal constitute cruel and unusual punishment and are unconstitutional under the eighth amendment. Robinson v. California, 370 U.S. 660 (1962) (holding unconstitutional a statute making it a crime to be a narcotics addict).

While the use of narcotics can be harmful independent of the status of being a narcotics addict and, therefore, may be proscribed, engaging in same-sex sexual behavior is not independently harmful. *See* notes 68–72 and accompanying text *supra*; People v. Onofre, 51 N.Y.2d 476, 489, 415 N.E.2d 936, 942, 434 N.Y.S.2d 947, 952–53 (1980), *cert. denied*, 101 S.Ct. 2323 (1981) (holding that while the use of marijuana within the privacy of one's home may be proscribed because it is independently harmful to the individual, private sexual activity may not be proscribed because it is not harmful).

85. Plaintiff's Opening Brief at 2, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975). Many of plaintiffs' arguments are beyond the scope of this Comment. In addition to claiming that the right of privacy was violated, plaintiffs contended that the Virginia statute violated the right of freedom of association, the establishment clause of the first amendment, the right of freedom of expression, the protection of the eighth amendment against cruel and unusual punishment, the due process clause of the fifth and fourteenth amendments, and the equal protection clause of the fourteenth amendment. For a discussion of the district court's failure to address these issues, see Comment, Doe v. Commonwealth's Attorney: *A Set-Back for the Right of Privacy*, 65 KY. L.J. 748 (1977); Recent Decision Note, Doe v. Commonwealth's Attorney, 15 DUQUESNE L. REV. 123 (1976).

86. Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). *See* text accompanying note 47 *supra*.

87. Robinson v. California, 370 U.S. 660 (1962). *See* note 84 *supra*.

District of Columbia,[88] and discrimination against gay people in all areas of daily life remains widespread. Professor Rivera, in an extensive overview of the legal status of homosexual persons in the United States, describes the differential treatment afforded gay people in the areas of private and federal employment,[89] security clearances,[90] military employment,[91] professional and occupational licensing,[92] teaching in the public schools,[93] marriage,[94] divorce,[95] child custody,[96] incorporation and tax exempt status,[97] liquor licensing,[98] universities and other public forums,[99] immigration and naturalization,[100] and criminal issues.[101] One commentator has described the effect of differential treatment afforded homosexual persons this way: "Deprived of the experience of personal competence and self-mastery, humans lack a sense of self-worth, leading to the despairing inner death central to apathy, cynicism, stoical remoteness, and spiritual slavery."[102] The values of intimate association, such as society, caring and commitment, intimacy, and self-identification, are implicated in any close personal relationship.[103] The formation of an intimate personal relationship is a manifestation of love between human beings, the importance of which is innately known to every human being.[104]

In the face of such discrimination, the courts have been hopelessly divided on whether to extend judicial protection to homosexual persons.

> Some courts would overturn dismissal of a homosexual who has publicly stated his views as a violation of the first amendment's guarantee of free speech, while others have allowed employers to fire homosexuals and thereby avoid "tacit approval of this socially repugnant concept." Some courts would treat removal of a homosexual bar's liquor license as a violation of the fourteenth amendment's equal protection clause, while others have reached the opposite conclusion. Some courts would hold that the ninth amendment's implicit right to privacy prohibits antisodomy laws as they apply to consenting adults, while others have limited that right to married couples. And some courts would allow a homophile organization the freedom to associate, while others would not.[105]

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88. *See* note 42 *supra*.

89. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 805–25 (1979).

90. *Id.* at 829–37.

91. *Id.* at 837–55.

92. *Id.* at 855–60.

93. *Id.* at 860–74.

94. *Id.* at 874–79.

95. *Id.* at 879–83.

96. *Id.* at 883–904.

97. *Id.* at 908–13.

98. *Id.* at 913–24.

99. *Id.* at 924–34.

100. *Id.* at 934–42.

101. *Id.* at 942–47.

102. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1306 (1977).

103. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 625, 629–37 (1980).

104. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1309 (1977).

105. Lasson, *Homosexual Rights: The Law in Flux and Conflict*, 9 BALT. L. REV. 47, 69–70 (1979) (citations omitted). *See also NGTF Files Lawsuit in Oklahoma to Protect Gay Teachers*, It's Time, Nov.-Dec. 1980, at 1, col. 1 (National Gay Task Force files suit to overturn OKLA. STAT. ANN. tit. 70, § 6–103.15 (West

Kenneth Karst suggests a simple solution to the problem of determining what aspects of homosexual conduct justify the proscription of that conduct:

> In this area, above all, the burden of justification is a critical issue; our governmental restrictions on homosexuals are very largely the product of folklore and fantasy rather than evidence of real risk of harm. Suppose the state had to *prove* that a lesbian mother, by virtue of her lesbian status alone, was unfit to have custody of her child. Suppose that the state had to *prove* that a male homosexual teacher, by virtue of his homosexual status alone, created special risk of seduction of children assigned to his classes. Would not such empirical enterprises finally demonstrate that the operative factor in the disqualification of homosexuals in such cases was not risk of harm, but stigma?[106]

Not all courts have permitted this denial of choice in intimate association to withstand constitutional scrutiny. In *People v. Onofre*[107] the New York Court of Appeals declined to follow the lead of other courts, holding that the prohibition of sexual conduct between persons of the same sex is unconstitutional. *Onofre* involved three lower court cases consolidated on appeal. One case involved consensual sodomy between two men in the privacy of their home;[108] one involved consensual sodomy between a man and woman in a parked car;[109] and one involved consensual sodomy between two men in a parked car.[110]

The New York Court of Appeals, emphasizing the value of personal autonomy, described the right of privacy as follows: "[I]t is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint. . . ."[111] The court rejected the argument that the restriction was necessary for the protection of public morals:

> [I]t is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values. . . . The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological

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Supp. 1981), which "prohibits the employment of homosexuals or any person who advocates gay rights by Oklahoma school systems."). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 941 (1978) ("The problem of differential impact plays a particularly striking role when the state seeks to dictate the sexual practices and preferences of adults in our society. Courts applying the decisions in *Griswold v. Connecticut* and *Eisenstadt v. Baird* have differed on the question of whether consenting adult homosexuality can be made a crime or otherwise burdened when the only activities performed occur in discreet privacy."); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 682 (1980) ("All the values of intimate association are potentially involved in homosexual relationships; all have been impaired, in various ways, by governmental restrictions on homosexual conduct and on persons who are deemed to be homosexuals."); *see generally* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

106. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 685–86 (1980) (emphasis in original). In essence, state legislators and courts have created an irrebuttable presumption that homosexual status makes one *per se* unfit for many natural roles.

107. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S.Ct. 2323 (1981).

108. *Id.* at 484, 415 N.E.2d at 937–38, 434 N.Y.S.2d at 948.

109. *Id.*

110. *Id.*

111. *Id.* at 485, 415 N.E.2d at 939, 434 N.Y.S.2d at 949.

and psychiatric counselling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.[112]

The court also drew a distinction between public and private morals:

[T]he private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality. . . . So here, the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual morality chosen by the state.[113]

The New York Court of Appeals concluded that the consensual sodomy statute at issue[114] was unconstitutional because it abridged the right of privacy.[115] This holding also was based upon the irrational distinction in the statute between conduct performed by married couples[116] and the same conduct performed by unmarried heterosexual or homosexual couples.[117] Considering that private, consensual, "deviant" sexual intercourse does not affect public morals,[118] is not dangerous to the health of the participants,[119] and is not a substitute or alternative to the institution of marriage,[120] the court concluded that none of these considerations justified the intrusion by the state into the private choices of the defendants.

III. International Recognition of the Right of Privacy: The Right to Respect for Private Life

The right of privacy has been invoked under the authority of the European Convention on Human Rights[121] to protect the right of gay men to

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112. *Id.* at 488 n.3, 415 N.E.2d at 940 n.3, 434 N.Y.S.2d at 951 n.3.

113. *Id.* at 489, 415 N.E.2d at 941, 434 N.Y.S.2d at 952. The permissible limits of governmental regulation of public morality may be determined under first amendment principles. Miller v. California, 413 U.S. 15 (1973); Stanley v. Georgia, 394 U.S. 557 (1969). *See also* Case Comment, *Sticks and Stones: Homosexual Solicitations and the Fighting Words Doctrine*, 41 OHIO ST. L.J. 553 (1980).

114. The New York statute reads as follows: "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person. Consensual sodomy is a class B misdemeanor." N.Y. PENAL LAW § 130.38 (1975). "Deviate sexual intercourse" is defined as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." N.Y. PENAL LAW § 130.00(2) (1975).

115. People v. Onofre, 51 N.Y.2d 476, 485, 415 N.E.2d 936, 938, 434 N.Y.S.2d 947, 949 (1980), *cert. denied*, 101 S.Ct. 2323 (1981).

116. *See* note 114 *supra*.

117. The court stated:

Because the statutes are broad enough to reach noncommercial cloistered personal sexual conduct of consenting adults and because it permits the same conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy and the right to equal protection of the laws guaranteed them by the United States Constitution.

People v. Onofre, 51 N.Y.2d 476, 485, 415 N.E.2d 936, 938–39, 434 N.Y.S.2d 947, 949 (1980), *cert. denied*, 101 S.Ct. 2323 (1981).

118. *Id.* at 489, 415 N.E.2d at 941, 434 N.Y.S.2d at 952.

119. *Id.*

120. *Id.*

121. The European Convention on Human Rights was adopted in 1950. Prior to the adoption of this document, the United Nations had adopted the Universal Declaration of Human Rights in 1948, Article 12 of which deals with the right to respect for private life. EUROPEAN CONVENTION ON HUMAN RIGHTS MANUAL 4 (1963).

live their chosen lifestyle free of governmental intrusion. In *Dudgeon v. United Kingdom*[122] the European Court of Human Rights ruled that Northern Ireland's sodomy law violated the right to respect for private life guaranteed by Article 8 of the European Convention on Human Rights.[123]

On May 22, 1976, Jeffrey Dudgeon, a member of the Northern Ireland Gay Rights Association,[124] filed a complaint with the European Commission of Human Rights, alleging that Northern Ireland's sodomy law, which prohibited consensual private homosexual acts between men, violated the right to respect for private life.[125] A similar law had been repealed in England in 1967 when the recommendations of the Wolfenden Report[126] were adopted.[127] The Wolfenden Report was prepared for the British Parliament and considered "scientific facts, the sentiment of the community, the wisdom of legal and scientific experts, the structure of the law, and the ideals of a civilized society" in reaching its conclusions.[128] Drafters of this report rejected the protection of morals as a justification for the criminalization of private homosexual conduct after considering the proper relation between concepts of morality and the criminal law: "But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behavior of this kind."[129]

The European Commission of Human Rights concluded, by a vote of eight to one, that the legal prohibition against homosexual conduct between men aged twenty-one years and older breached Article 8 of the European Convention on Human Rights and, agreeing with the drafters of the Wolfenden Report, that the prohibition was not justified by the alleged protection of morals.[130] The Commission stated:

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122. 1981 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Court on Human Rights) (judgment).

123. Article 8 of the European Convention on Human Rights reads as follows:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. VIII, 213 U.N.T.S. 221.

124. The Times (London), Aug. 4, 1980, at 2, col. 3.

125. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights), *aff'd*, 1981 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Ct. of Human Rights).

126. WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1963).

127. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights) (judgment).

128. WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 5 (1963).

129. *Id.* at ¶ 54.

130. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights) (judgment). The European Convention on Human Rights contains an internal procedure for bringing a complaint before the European Commission of Human Rights and the European Court of Human Rights. While individual applicants may not bring a complaint before to the European Court of Human Rights, they may bring a complaint before the European Commission of Human Rights after satisfying several prelimin-

> [T]he Convention . . . preserves to the individual an area of strictly private morality in which the State may not interfere. . . . It would be quite contrary to this principle to interpret Art. 8(2) as allowing a majority an unqualified right to impose its standards of private sexual morality on the whole of society.[131]

Despite the Irish government's argument that the prohibition of homosexual conduct was necessary in a democratic society for the protection of morals,[132] the Commission was not convinced that any "pressing social need" had been shown requiring the maintenance of this prohibition.[133]

The government also argued that Dudgeon was not a victim of a breach of the European Convention on Human Rights[134] because he had never been prosecuted under the sodomy law at issue.[135] The applicant asserted that "he had personally suffered prejudice, in the form of fear and distress, as a result of the existence of these offences":[136]

> He [Dudgeon] stated that he had been consciously homosexual from the age of fourteen years; he had been aware of disapproving social attitudes toward homo-

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ary requirements. The requirements include: the applicant must be a victim of a breach of the Convention (Article 25); the act of which the applicant complains must be an act of a public authority (Article 25); the government against which the applicant complains must recognize the right of individual petition (Article 25); the applicant must make a reasonable effort to obtain redress of his or her grievance in the country concerned before making application to the Commission (Article 26); and the application must be brought within six months of the act of which the applicant complains or within six months of the decision of the country concerned, including any final decision on efforts to obtain redress (Article 26). The Commission will not deal with an application that is anonymous or one that is substantially the same as a matter already considered (Article 27).

The Commission then reviews the application and may deem it inadmissible for any of the above reasons (Article 27). An opinion is published, stating the Commission's reasons for declaring the application inadmissible. When a petition is declared admissible, i.e., accepted, the Commission may examine the petition with assistance from the representatives of the parties and investigate the facts alleged (Article 28). Article 28 of the Convention charges the Commission with the duty to secure a friendly settlement of the complaint, if possible. If no friendly settlement can be reached, the Commission adopts its report under Article 31 of the Convention. This report contains the findings of fact and an opinion discussing whether the Convention has been breached. The report is then transmitted to the Committee of Ministers of the Council of Europe and to all of the states involved, none of which is at liberty to publish the opinion of the Commission (Article 31). The Committee of Ministers, in turn, must either refer the application to the Court of Human Rights within three months or decide by majority vote whether the Convention has been breached (Article 32). The decisions of the Committee of Ministers are binding on the High Contracting Parties (member states) by virtue of Article 32 of the Convention. It is important to note that only the High Contracting Parties, the European Commission of Human Rights, and the Committee of Ministers may bring a case before the European Court of Human Rights; individual applicants must first appeal to the Commission. EUROPEAN CONVENTION ON HUMAN RIGHTS MANUAL 97–122 (1963); J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 227–322 (1969).

The *Dudgeon* case was referred to the European Court of Human Rights by the Council of Ministers of the Council of Europe on July 18, 1980. The court rendered its decision on October 22, 1980, affirming the decision of the Commission that Northern Ireland's sodomy law breached Article 8 of the European Convention on Human Rights. Dudgeon Case, 1981 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Ct. on Human Rights) (judgment).

131. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights) (judgment).

132. *Id.* at —.

133. *Id.* at —.

134. Article 25 of the European Convention of Human Rights requires that the applicant under the Convention be a victim of a breach of the Convention. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art XXV, 213 U.N.T.S. 221. J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 277–88 (1969).

135. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights) (judgment).

136. *Id.* at —.

> sexual behavior and had experienced fear, suffering and distress directly caused by the existence of the offences in question. He alleged that the prejudice he had personally suffered included psychological distress, fear of legal repercussions through meeting with other homosexuals, fear of harassment, blackmail, persecution and resultant disclosure and exposure. Relations with his family had been affected by parental fears that his homosexual status might become known. This had caused psychological upset and retardation of his motivation to advance himself. He had thus suffered direct economic loss.[137]

Accepting Dudgeon's description of the harm he had suffered and holding that this satisfied the requirement that an applicant be a victim of breach of the Convention,[138] the Commission stated:

> [T]he mere fact that a penal law has not been enforced by means of criminal proceedings, or is unlikely to be so enforced, does not of itself negate the possibility that it has effects amounting to interference with private life. A primary purpose of any such law is to prevent the conduct it proscribes, by persuasion or deterrence. It also stigmatises the conduct as unlawful and undesirable. These aspects must also be taken into consideration.
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> . . . [I]t is inevitable, in the Commission's opinion, that the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals.[139]

In summarily affirming the district court decision, the United States Supreme Court may have relied on the fact that the plaintiffs in *Doe v. Commonwealth's Attorney*[140] had never been charged or prosecuted under the Virginia sodomy statute. The Supreme Court may have concluded that the plaintiffs thus lacked standing to assert the unconstitutionality of the Virginia statute.[141] As exposed in the well-reasoned opinion of the European Commission of Human Rights, this belief that homosexual persons who have not been prosecuted under sodomy statutes have not "sustained or [are not] immediately in danger of sustaining some direct injury"[142] from these laws is clearly

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137. *Id.* at —.

138. *See* note 134 *supra.*

139. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights), *aff'd*, 1981 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Ct. of Human Rights).

140. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

141. People v. Onofre, 51 N.Y.2d 476, 493, 415 N.E.2d 936, 943, 434 N.Y.S.2d 947, 954 (1980), *cert. denied*, 101 S.Ct. 2323 (1981). In this respect, it is significant that the Supreme Court denied certiorari in *Onofre*, a case holding that New York's sodomy law violated the right of privacy. *Onofre* presented the New York Court of Appeals with three actual prosecutions under the statute at issue while *Doe v. Commonwealth's Attorney* sought a declaratory judgment regarding the Virginia sodomy statute. *Cf.* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (indigent persons and organizations representing indigent persons' interests held not to have standing to challenge I.R.S. ruling granting favorable tax treatment to hospitals that exclude indigent persons); Warth v. Seldin, 422 U.S. 490 (1975) (individuals seeking to reside in area of Rochester, N.Y., Rochester taxpayers, organizations of residents of the area of Rochester affected, and housing developers held not to have standing to assert cause of action based on fact that Rochester zoning ordinance excluded low income persons from given area of city); Laird v. Tatum, 408 U.S. 1 (1972) (political activists under surveillance by Army lack standing to assert violation of first amendment right of freedom of association); Sierra Club v. Morton, 405 U.S. 727 (1972) (environmental public interest group lacked standing to attack recreational development in national forest).

142. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). *See* cases cited in note 141 *supra.*

wrong. Homosexual persons have suffered, and continue to suffer, discrimination and abuse in the name of the protection of public decency.[143]

The discrimination suffered by homosexual persons in Northern Ireland is comparable to that suffered by homosexual residents of states within the United States retaining criminal penalties for homosexual conduct. The separate opinion of Mr. Polak in *Dudgeon v. United Kingdom* aptly summarizes this discrimination:

> The prohibition, with its possibility of very heavy sanctions in case of contravention, stigmatizes homosexuality between consenting adults in private as a very severe crime. By doing so the State . . . supports and intensifies old and deep-seated sentiments of aversion and fear which have been proved to be unjustifiable and without factual ground. It strengthens the prejudices against homosexuals, it perpetuates their fear of prosecution and punishment, it compels them to keep secret or suppress their sexual inclinations and wishes, and it increases the danger of blackmail. By maintaining these provisions the State discriminates strongly against this group of the population in comparison with heterosexual adults who are free to have any kind of sexual contact in private. This difference amounts to a clear inequality of treatment in the enjoyment of the right in question, which is a fundamental aspect of this case.[144]

The interference with private life caused by sodomy laws had reached the European Commission of Human Rights before Dudgeon brought his claim.[145] However, the ruling in *Dudgeon v. United Kingdom* represents the first time that an international tribunal has held that the legitimate governmental objective of protecting public morals does not justify the wholesale proscription of private adult homosexual conduct.[146] Both the European Commission on Human Rights and the European Court of Human Rights, applying the European Convention on Human Rights' version of the right of privacy, concluded that the fundamental right of intimate association could not be subordinated to a majority view of morality.

Like the right of privacy in the United States, the right to respect for private life under Article 8 of the European Convention on Human Rights has been expanded slowly by the European Commission on Human Rights until it now embraces the right of intimate association. In a 1960 application before the Commission a citizen of Germany complained that the German Penal Code, which made homosexual acts a crime, violated his right to respect for private life under Article 8.[147] In this case, the police had searched the appli-

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143. *See* notes 88–105 and accompanying text *supra*.

144. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights) (judgment).

145. Application No. 530/59, 1960 Y. B. EUR. CONV. ON HUMAN RIGHTS 184 (Eur. Comm'n on Human Rights); X. v. Federal Republic of Germany, 1976 Y. B. EUR. CONV. ON HUMAN RIGHTS 276 (Eur. Comm'n on Human Rights); X. v. United Kingdom, 1978 Y. B. EUR. CONV. ON HUMAN RIGHTS 354 (Eur. Comm'n on Human Rights) (determination of admissibility).

146. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights), *aff'd*, 1981 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Ct. of Human Rights).

147. Application No. 530/59, 1960 Y. B. EUR. CONV. ON HUMAN RIGHTS 184, 188 (Eur. Comm'n on Human Rights).

cant's home and had seized books and papers, an act that had resulted in searches of other persons' homes.[148] The applicant asserted that "[t]o make [homosexuality] an offence is a violation of the right to life, the corollary of which is the right to love."[149] The Commission concluded that the complaint did not state a violation of the right to respect for private life under Article 8, and that the interference described could be justified by the protection of public morals.[150] The Commission then proceeded to declare the application inadmissible.[151]

In 1975 the Commission again had occasion to review an application charging that another section of the German Penal Code violated the right to respect for private life under Article 8. The complaint in *X. v. Federal Republic of Germany*[152] alleged that the German statute that prohibited homosexual acts with men[153] under the age of twenty-one breached Article 8 of the European Convention on Human Rights. The applicant had been convicted of engaging in homosexual conduct with men under the age of twenty-one.[154] The Commission found that "[a] person's sexual life is undoubtedly part of his private life of which it constitutes an important aspect."[155] However, it determined that the application was inadmissible because "[t]he fact remains that the action of the German legislature was clearly inspired by the need to protect the rights of children and adolescents and enable them to achieve true autonomy in sexual matters."[156] Unlike the proscription of private consensual homosexual conduct between adults at issue in *Dudgeon*, the European Commission here examined the need to protect young people from homosexual experience.

In 1978 the Commission adopted its report under Article 31 in *X. v. United Kingdom*,[157] a case substantially similar to that of the 1976 case of *X. v. Federal Republic of Germany*. The *X. v. United Kingdom* application was declared admissible on July 7, 1977.[158] Apparently, in the two years between the German application and this British application, the Commission had made a decision to review more thoroughly the issue of the relationship

148. *Id.*

149. *Id.*

150. *Id.* at 190.

151. *Id.* at 196. *See* note 130 *supra* for the requirements that must be met to make an application admissible.

152. 1976 Y. B. EUR. CONV. ON HUMAN RIGHTS 276 (Eur. Comm'n on Human Rights).

153. The German statute, STRAFGESETZBUCH [StGB] art. 175(2), by its language expressly applied only to males. *Id.* at 286.

154. *Id.* at 278.

155. *Id.* at 284. *See also* notes 130–46 and accompanying text *supra* (In 1980 the European Commission of Human Rights concluded that the protection of morality would not justify the wholesale proscription of homosexuality.); notes 158–59 *infra* (In 1978, the Commission concluded that a higher age of consent for homosexual, as opposed to heterosexual, conduct is justified by the need for the protection of others.).

156. X. v. Federal Republic of Germany, 1976 Y. B. EUR. CONV. ON HUMAN RIGHTS 276, 284–86 (Eur. Comm'n on Human Rights).

157. 1978 Y. B. EUR. CONV. ON HUMAN RIGHTS 354 (Eur. Comm'n on Human Rights) (determination of admissibility).

158. *Id.* at 374.

between laws regulating homosexual conduct and the right of respect for private life.[159]

In *X. v. United Kingdom* the applicant complained that his conviction under the English law forbidding homosexual conduct with men[160] under the age of twenty-one, while heterosexual conduct was permitted between persons aged eighteen or older, breached his right to respect for private life under Article 8.[161] The applicant pointed out that only three European countries totally prohibit homosexual conduct;[162] that three impose no special restrictions on homosexual conduct;[163] and that the remaining European countries' legislation prescribe various ages of consent for homosexual conduct, virtually all of which are lower than the age of consent provided under English law.[164] The Commission concluded that the prosecution and imprisonment of the applicant constituted interference with his private life,[165] but that such interference was justified under the protection of the rights of others under paragraph two of Article 8.[166] The Commission did not deem it necessary to reach the issue of whether the restrictions were necessary to protect the morals of the country as claimed by the respondent government.[167] The Commission placed heavy emphasis on the finding of the English appeals court that the applicant had used force in his relationship with one of his under-age partners.[168] It is not known how the Commission would have decided the case had these allegations of violence been absent from the record.

Thus, the European Commission of Human Rights repeatedly has addressed the issue of whether restrictions on homosexual conduct interfere with the right to respect for private life. The Commission has concluded that such restrictions do interfere with the right to respect for private life but that, at least where force or violence is used, a higher age of consent for homosexual conduct may be required than that for heterosexual conduct. However, a total proscription of homosexual conduct constitutes an interference

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159. If the Commission determines that a complaint raises no issue of breach of the Convention, it may declare the application inadmissible. If the Commission requires further investigation, it may declare the application admissible. *See* note 130 *supra*.

160. The English statute, Sexual Offences Act, 4 & 5 Eliz.2, ch. 69, § 13 (1956), by its language applied only to males.

161. X. v. United Kingdom, 1978 Y. B. EUR. CONV. ON HUMAN RIGHTS 354, 368 (Eur. Comm'n on Human Rights) (determination of admissibility).

162. The three countries that prohibit homosexual conduct are the U.S.S.R., Rumania, and Eire. Case of X. REPORT OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS ¶ 57 (Eur. Conv. on Human Rights) (1978). *But see* notes 122–46 and accompanying text *supra* (discussing sodomy law of Northern Ireland found to breach applicant's right to respect for private life).

163. The three countries with no special restrictions are Norway, Portugal, and Italy. Case of X. REPORT OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS ¶ 57 (Eur. Conv. on Human Rights) (1978).

164. *Id.*

165. *Id.* at ¶ 127.

166. *Id.* at ¶ 135.

167. *Id.* at ¶ 136. *See* notes 122–46 and accompanying text *supra* (protection of public morality will not justify total proscription of homosexual conduct).

168. Case of X. REPORT OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS ¶¶ 131–35 (Eur. Conv. on Human Rights) (1978).

with the right to respect for private life that is not justified by the objective of protecting morals.

IV. Rational Limits on the Right of Privacy: A Proposed Constitutional Standard

The right of privacy has progressed both within the United States[169] and within an international context.[170] What had its origins in the United States in the protection of the "orderly pursuit of happiness"[171] has progressed to include the rights to determine how one's children will be educated,[172] to enjoy the sanctity of the home free of unwarranted intrusion by the state,[173] to use contraceptives, whether the individual is married[174] or unmarried,[175] to choose to terminate a pregnancy,[176] and to define one's own family unit without interference by the state.[177] The foundation underlying these decisions is the protection of the "orderly pursuit of happiness," of which the pursuit of intimate relationships is an integral component.[178]

This right of privacy in the United States is a right of autonomy. It is a right with which the state may not interfere absent compelling justification.[179] The right of privacy provides protection for the freedom to choose one's partner in intimate association, including a partner of the same sex, and to act upon that choice. Compelling justification for the prohibition of sexual conduct encompassed by sodomy statutes does not exist.[180]

The same protection for private life, embodied in Article 8 of the European Convention on Human Rights and Article 12 of the Universal Declaration of Human Rights of the United Nations,[181] has been recognized as encompassing sexual intimacy within the private sphere.[182] The justifications under this international law for governmental intervention into one's private sphere have progressed from the general protection of morals[183] to the protec-

169. *See* notes 9–32 and accompanying text *supra*.

170. *See* notes 122–68 and accompanying text *supra*.

171. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See* notes 23–25 and accompanying text *supra*.

172. Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See* note 23 and accompanying text *supra*.

173. Stanley v. Georgia, 394 U.S. 557 (1969). *See* notes 26–30 and accompanying text *supra*.

174. Griswold v. Connecticut, 381 U.S. 479 (1965). *See* notes 10–12 and accompanying text *supra*.

175. Eisenstadt v. Baird, 405 U.S. 438 (1972). *See* notes 13–14 and accompanying text *supra*.

176. Roe v. Wade, 410 U.S. 113 (1973). *See* notes 15–21 and accompanying text *supra*.

177. Moore v. City of East Cleveland, 431 U.S. 494 (1977). *See generally* notes 9–41 and accompanying text *supra*.

178. *See* notes 31–32 and accompanying text *supra*.

179. *See* note 21 *supra*.

180. *See* notes 42–83 and accompanying text *supra*.

181. Article 12 of the Universal Declaration of Human Rights of the United Nations reads as follows: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks." Universal Declaration of Human Rights, G. A. Res 217 (III), U.N. Dec. A/810, at 75 (1948).

182. *See* notes 121–34 and accompanying text *supra*.

183. Application No. 530/59, 1960 Y. B. EUR. CONV. ON HUMAN RIGHTS 184 (Eur. Comm'n on Human Rights).

tion of others.[184] No longer is the protection of morality and decency considered a necessary aim requiring interference with an individual's choice of intimate association.[185]

The same justifications as proposed by the proponents of sodomy legislation in the United States failed to convince the European Commission (and Court) of Human Rights of the necessity of such legislation.[186] The European Convention on Human Rights, like the Universal Declaration of Human Rights, protects only the most fundamental of human rights—those necessary for the meaningful existence of a people.

> *Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world . . . . *Whereas* the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom . . . . *Now, therefore, the General Assembly Proclaims* this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations.[187]

The right of privacy, as it has evolved within the United States, comports easily with the right to respect for private life as it has evolved under international law. It remains for the Supreme Court of the United States, consistent with its countermajoritarian function of preserving the rights of minority populations,[188] to recognize expressly the right of all citizens of the United States to be free to associate in intimate relationships without unwarranted governmental intrusion. Only when the highest authority has extended protection for individual choices in intimate association will the egregious discrimination encountered by homosexual persons in the United States[189] cease.

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184. X. v. Federal Republic of Germany, 1976 Y. B. EUR. CONV. ON HUMAN RIGHTS 276 (Eur. Comm'n on Human Rights).

185. Dudgeon v. United Kingdom, 1980 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Comm'n on Human Rights), *aff'd*, 1981 Y. B. EUR. CONV. ON HUMAN RIGHTS—(Eur. Ct. of Human Rights).

186. *Id.* In compliance with the decision of the European Court, the British government has agreed to repeal the sodomy statute in Northern England, bringing that statute into line with those in the remainder of the United Kingdom.

187. Universal Declaration of Human Rights, G. A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948), *reprinted in* L. SOHN & T. BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 30-31 (1973).

188. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 (1938).

189. *See* notes 88-104 and accompanying text *supra*.